

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SHERI J. TIPPIN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 15-cv-05514-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 5; Consent to Proceed Before a United States Magistrate Judge, Dkt. 6). This matter has been fully briefed (*see* Dkt. 11, 18, 19).

After considering and reviewing the record, the Court concludes that the ALJ erred by failing to discuss significant probative evidence. The observations and opinions

1 from an other medical source that the ALJ failed to discuss directly contradict the finding
2 relied on by the ALJ for his rejection of the opinion of an examining doctor.

3 Therefore, this matter is reversed and remanded pursuant to sentence four of 42
4 U.S.C. § 405(g) to the Acting Commissioner for further consideration consistent with this
5 order.

6 BACKGROUND

7 Plaintiff, SHERRI J. TIPPN, was born in November, 1962 and was 49 years old
8 on the amended alleged date of disability onset of November 1, 2012 (*see* AR. 23).
9 Plaintiff has two associates degrees (*see* AR. 45). Plaintiff has past relevant work as a
10 stock control clerk, receptionist, and clerk (AR. 23).
11

12 According to the ALJ, plaintiff has at least the severe impairments of “anxiety
13 (mostly around math) with depressive/dysthymic disorder; cognitive disorder/math
14 learning disorder/processing disorder; obesity; headache/sinusitis; left heel spur;
15 degenerative disc disease of the lumbar spine; cervical spine degenerative disc
16 disease/strain; and carpal tunnel syndrome (20 C.F.R. 404.1520 (c) and 416.920 (c))”
17 (AR. 12).

18 At the time of the hearing, plaintiff was living with her mother (AR. 42).

19 PROCEDURAL HISTORY

20 Plaintiff’s application for Supplemental Security Income (“SSI”) benefits pursuant
21 to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and
22 following reconsideration (*see* AR. 9). Plaintiff’s requested hearing was held before
23 Administrative Law Judge Michael Gilbert (“the ALJ”) on June 5, 2013 (*see* AR. 33-91).
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1 On December 10, 2013 the ALJ issued a written decision in which the ALJ concluded
2 that plaintiff was not disabled pursuant to the Social Security Act (*see* AR. 6-32).

3 In plaintiff's Opening Brief, plaintiff raises the following issues: (1) whether or
4 not the ALJ properly evaluated the medical evidence; (2) whether or not the ALJ properly
5 evaluated plaintiff's testimony; (3) whether or not the ALJ properly evaluated the lay
6 evidence; (4) whether or not the ALJ properly assessed plaintiff's residual functional
7 capacity ("RFC"); and (5) whether or not the ALJ erred by basing his step five findings
8 on a RFC assessment that did not include all of plaintiff's limitations, and by failing to
9 find that plaintiff is disabled pursuant to Medical-Vocational Rule 201.14 (*see* Dkt. 11, p.
10 2).
11

12 STANDARD OF REVIEW

13 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
14 denial of social security benefits if the ALJ's findings are based on legal error or not
15 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
16 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
17 1999)).
18

19 DISCUSSION

20 **1. Whether or not the ALJ properly evaluated the medical evidence.**

21 Plaintiff contends the ALJ erred by failing to discuss clinical findings that are
22 significant probative evidence (*see* Dkt. 11, p. 9; *see also* Dkt. 19, pp. 6-7). Defendant
23 contends there is no error.
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1 The ALJ must explain why his own interpretations, rather than those of the
2 doctors, are correct. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Embrey*
3 *v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). But, the Commissioner “may not reject
4 ‘significant probative evidence’ without explanation.” *Flores v. Shalala*, 49 F.3d 562,
5 570-71 (9th Cir. 1995) (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984)
6 (quoting *Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981))). The “ALJ’s written
7 decision must state reasons for disregarding [such] evidence.” *Flores, supra*, 49 F.3d at
8 571; *see also Marsh v. Colvin*, 792 F.3d 1170, 1172-73 (9th Cir. 2015) (citing *Garrison*
9 *v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014)).

11 Most of the evidence cited by the ALJ, including medical opinions given
12 “significant weight,” is dated prior to plaintiff’s amended alleged date of disability onset.
13 This is particularly problematic here as the ALJ failed to discuss significant probative
14 evidence dated after plaintiff’s alleged date of onset that contradicts the ALJ’s findings
15 and rejection of medical opinion evidence.

16 For example, the ALJ only provided one reason for failing to credit fully the
17 opinion of examining doctor, Dr. Robert E Schneider, Ph.D., that plaintiff’s “depression
18 would interfere with her ability to succeed at gainful employment” (AR. 22). The ALJ
19 rejected this opinion with the finding that “the evidence of file including the claimant’s
20 ability to attend school demonstrates an improvement in her symptoms since his
21 evaluation” (*id.*). There are multiple problems with the ALJ’s rejection of this opinion
22 with this finding. *See Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (When an
23 opinion from an examining doctor is contradicted by other medical opinions, the
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1 examining doctor's opinion can be rejected only "for specific and legitimate reasons that
2 are supported by substantial evidence in the record") (*citing Andrews v. Shalala*, 53 F.3d
3 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)); *see*
4 *also* 20 C.F.R. §§ 404.1527(a)(2) ("Medical opinions are statements from physicians and
5 psychologists or other acceptable medical sources that reflect judgments about the nature
6 and severity of your impairment(s), including your symptoms, diagnosis and prognosis,
7 what you can still do despite impairment(s), and your physical or mental restrictions").

8
9 First, although the ALJ refers to the "ability to attend school," the ALJ failed to
10 explain how plaintiff's ability to attend school for one hour per day demonstrates an
11 improvement in plaintiff's symptoms and contradicts the opinion from Dr. Schneider that
12 plaintiff's depression would interfere with her ability to succeed at gainful employment
13 (*see* AR. 48 (plaintiff testified that she only is taking math, "Monday through Friday, 9
14 AM to 10 AM")). The ability to attend school for one hour per day does not demonstrate
15 an ability to succeed at full-time gainful employment.

16 In addition, as noted by plaintiff, the ALJ failed to explain why he disregarded the
17 fact that plaintiff was dropped from her scholastic program due to poor grades (*see* AR.
18 45-46, 49-50). Although plaintiff previously had attended classes for four hours a day
19 from the fall of 2012 through March 2013, this still does not demonstrate an
20 inconsistency with the opinion from Dr. Schneider that plaintiff's depression would
21 interfere with her ability to succeed at full-time gainful employment, and also, plaintiff's
22 success in this coursework was short-lived as she was dis-enrolled in March 2013 (*see*
23 AR. 50 (plaintiff's "overall GPA was too low and they dis-enrolled [her]")). Attending
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1 school for four hours a day does not contradict Dr. Schneider's opinion that depression
2 would interfere with her ability to succeed at a full time job, which generally requires
3 attendance at work for eight hours a day.

4 The record suggests that plaintiff's short-lived success at school was analogous to
5 an unsuccessful work attempt. Evidence in the record suggests that the demands of
6 attending school four hours a day exasperated plaintiff's psychological symptoms. On
7 October 23, 2012, after only a short time attending classes for four hours a day, ARNP
8 Henry reported that plaintiff's "anxiety is aggravated by school, [i]nterventions the
9 patient has tried have not provided any relief" (AR. 685). Similarly, on March 19, 2013,
10 plaintiff complained of "worsening depression with excessive sleeping due to stress at
11 school" (AR. 705). The ALJ did not reconcile this evidence with his contradictory
12 finding that her attendance at school demonstrates improvement in her symptoms.
13 According to the Ninth Circuit Court of Appeals, "[i]t does not follow from the fact that a
14 claimant tried to work for a short period of time and, because of h[er] impairments,
15 *failed*, that [s]he did not then experience [symptoms] and limitations severe enough to
16 preclude h[er] from *maintaining* substantial gainful employment." *Lingenfelter v. Astrue*,
17 504 F.3d 1028, 1038 (9th Cir. 2007) (emphases in original). In fact, such evidence in
18 some circumstances may support allegations of disabling symptoms. *See id.* (citing *Fair*
19 *v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989)).
20

21 Furthermore, perhaps more importantly, significant probative evidence from
22 shortly before and from after plaintiff's alleged date of disability onset in the form of
23 observations and opinions regarding plaintiff's mental functioning also contradict the
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1 finding by the ALJ that plaintiff's symptoms improved after the evaluation of Dr.
2 Schneider. As noted by plaintiff, on October 23, 2012, Ms. Kathleen Henry, ARNP,
3 observed that plaintiff was anxious and tearful, and showed poor self-esteem as well as
4 chronic negative self talk (Dkt. 11, p. 6 (*citing* AR. 667-68)). ARNP Henry observed that
5 plaintiff was "positive for anhedonia, [was] agitated, [was] anxious," was fearful, and did
6 "not demonstrate the appropriate mood or affect" (AR. 668). ARNP Henry assessed that
7 plaintiff was suffering from anxiety with depression, dysthymic disorder, which was
8 "worse" (*id.*). None of these observations, nor ARNP Henry's opinion that plaintiff's
9 mental impairment was worse, were discussed by the ALJ. ARNP Henry's assessment
10 that plaintiff's mental impairment was worse directly contradicts the finding by the ALJ
11 that plaintiff's symptoms improved sufficiently subsequent to Dr. Schneider's opinion to
12 support a rejection of his opinion regarding the functional limitations resulting from
13 plaintiff's depression (*see id.*). In the context of the ALJ's rejection of the opinion of an
14 examining doctor regarding plaintiff's specific work-related functional limitations, this
15 contradictory information is significant probative evidence that the ALJ erred by failing
16 to discuss. *See Flores, supra*, 49 F.3d at 571.

18 Similarly, on February 6, 2013, ARNP Henry observed that plaintiff's "overall
19 appearance [was] depressed" (AR. 700). She also observed that plaintiff had a labile
20 affect (*id.*). ARNP Henry indicated that plaintiff was positive for anhedonia, was agitated
21 and anxious, and did "not demonstrate the appropriate mood or affect" (*id.*). Again,
22 ARNP Henry opined that plaintiff's mental impairment was "worse" (AR. 701). And,
23 again, the ALJ failed to discuss this significant probative evidence which directly
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1 contradicts the ALJ's finding that plaintiff's symptoms improved after Dr. Schneider's
2 opinion.

3 Finally, on March 19, 2013, ARNP Henry observed that plaintiff presented with
4 depressed mood (AR. 706). She observed that plaintiff had a labile affect, was positive
5 for anhedonia, was agitated and anxious, and did "not demonstrate the appropriate mood
6 or affect" (AR. 706-07). She again opined that plaintiff's mental impairment was worse,
7 and increased plaintiff's prescription for paroxetine (AR. 707). The ALJ failed to explain
8 why he rejected this evidence, which contradicts his finding that plaintiff's symptoms
9 improved after the evaluation from Dr. Schneider (*see* AR. 22).

10 Although defendant contends that the ALJ discussed some observations from
11 ARNP Henry, defendant does not acknowledge that the ALJ failed to discuss these last
12 two sets of observations noted above from ARNP Henry which took place following
13 plaintiff's alleged date of disability onset and that the ALJ did not discuss the October 25,
14 2012 observations noted above from ARNP Henry which occurred just prior to plaintiff's
15 alleged date of disability onset. As these observations and opinions directly contradict the
16 only rationale provided by the ALJ for his failure to credit fully the opinion of an
17 examining doctor regarding plaintiff's limitations resulting from her mental impairments,
18 the ALJ needs to "state reasons for disregarding [such] evidence." *Flores, supra*, 49 F.3d
19 at 571. The Court also concludes that this error is not harmless.

20 The Ninth Circuit has "recognized that harmless error principles apply in the
21 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
22 (*citing Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
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24

1 Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in
2 *Stout* that “ALJ errors in social security are harmless if they are ‘inconsequential to the
3 ultimate nondisability determination’ and that ‘a reviewing court cannot consider [an]
4 error harmless unless it can confidently conclude that no reasonable ALJ, when fully
5 crediting the testimony, could have reached a different disability determination.’” *Marsh*
6 *v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. July 10, 2015) (citing *Stout*, 454 F.3d at 1055-
7 56). In *Marsh*, even though “the district court gave persuasive reasons to determine
8 harmless,” the Ninth Circuit reversed and remanded for further administrative
9 proceedings, noting that “the decision on disability rests with the ALJ and the
10 Commissioner of the Social Security Administration in the first instance, not with a
11 district court.” *Id.* (citing 20 C.F.R. § 404.1527(d)(1)-(3)).

13 Here, had the ALJ credited the opinion from ARNP Henry that plaintiff’s mental
14 impairment of anxiety with depression, dysthymic disorder was worse subsequent to the
15 opinion of Dr. Schneider, the ALJ would not have rejected the opinion of Dr. Schneider
16 on the basis that her symptoms improved after Dr. Schneider provided his opinion. As
17 this was the only finding supporting the ALJ’s rejection of the opinion of Dr. Schneider,
18 it is likely that with consideration of this contradictory evidence, the ALJ would have
19 credited in full the opinion of Dr. Schneider that plaintiff’s “depression would interfere
20 with her ability to succeed gainful employment” (AR. 22). A reasonable ALJ “when fully
21 crediting [this opinion from Dr. Schneider] could have reached a different disability
22 determination.”” *See Marsh, supra*, 792 F.3d at 1173. Therefore, the error is not harmless.
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1 However, because the ALJ failed to discuss this evidence, the proper resolution is
2 to remand this matter for further administrative proceedings, which may serve a useful
3 purpose. It is for the ALJ in the first instance to evaluate this evidence and determine the
4 effect on plaintiff's ability to perform work. *See Treichler v. Comm'r of Soc. Sec. Admin.*,
5 775 F.3d 1090, 1103-04 (9th Cir. 2014) (citations omitted) (remand for benefits is not
6 appropriate when further administrative proceedings would serve a useful purpose).

7
8 **2. Whether or not the ALJ properly evaluated plaintiff's credibility and the lay evidence.**

9 The Court already has concluded that the ALJ erred in reviewing the medical
10 evidence and that this matter should be reversed and remanded for further consideration,
11 *see supra*, section 1. In addition, a determination of a claimant's credibility relies in part
12 on the assessment of the medical evidence. *See* 20 C.F.R. § 404.1529(c). Therefore,
13 plaintiff's credibility should be assessed anew following remand of this matter. Similarly,
14 the lay evidence should be evaluated anew following remand of this matter

15
16 **3. Whether or not the ALJ properly assessed plaintiff's residual functional capacity ("RFC") and whether or not the ALJ properly based his step five finding on a proper RFC.**

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18 Because the medical evidence needs to be evaluated anew following remand of
19 this matter, the ALJ will have to reassess plaintiff's RFC and the remaining steps of the
20 sequential disability evaluation process.

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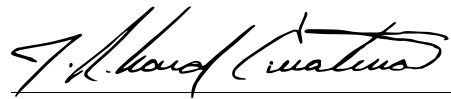
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CONCLUSION

Based on the stated reasons and the relevant record, the Court **ORDERS** that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g) to the Acting Commissioner for further consideration consistent with this order.

JUDGMENT should be for plaintiff and the case should be closed.

Dated this 24th day of May, 2016.

A handwritten signature in black ink, appearing to read "J. Richard Creatura", written over a horizontal line.

J. Richard Creatura
United States Magistrate Judge